

AD-A276 763



2

1993
Executive Research Project
S31

The War Powers Resolution-- A Troubled Past and Uncertain Future

Lieutenant Colonel
Douglas A. Grant
U.S. Air Force

DTIC
ELECTE
MAR 09 1994
S B D

Faculty Research Advisor
Dr. Alan G. Whittaker

94-07712



34pgs



DISTRIBUTION STATEMENT 4
Approved for public release;
Distribution Unlimited

The Industrial College of the Armed Forces
National Defense University
Fort McNair, Washington, D.C. 20319-6000

9 4 3 8 0 9 2

DTIC QUALITY INSPECTED 5

REPORT DOCUMENTATION PAGE

1a. REPORT SECURITY CLASSIFICATION Unclassified			1b. RESTRICTIVE MARKINGS		
2a. SECURITY CLASSIFICATION AUTHORITY N/A			3. DISTRIBUTION / AVAILABILITY OF REPORT Distribution Statement A: Approved for public release; distribution is unlimited.		
2b. DECLASSIFICATION / DOWNGRADING SCHEDULE N/A			5. MONITORING ORGANIZATION REPORT NUMBER(S) Same		
4. PERFORMING ORGANIZATION REPORT NUMBER(S) NDU-ICAF-93- 31			7a. NAME OF MONITORING ORGANIZATION National Defense University		
6a. NAME OF PERFORMING ORGANIZATION Industrial College of the Armed Forces		6b. OFFICE SYMBOL (if applicable) ICAF-FAP	7b. ADDRESS (City, State, and ZIP Code) Fort Lesley J. McNair Washington, D.C. 20319-6000		
6c. ADDRESS (City, State, and ZIP Code) Fort Lesley J. McNair Washington, D.C. 20319-6000		9. PROCUREMENT INSTRUMENT IDENTIFICATION NUMBER			
8a. NAME OF FUNDING / SPONSORING ORGANIZATION		8b. OFFICE SYMBOL (if applicable)	10. SOURCE OF FUNDING NUMBERS		
8c. ADDRESS (City, State, and ZIP Code)		PROGRAM ELEMENT NO.	PROJECT NO.	TASK NO.	WORK UNIT ACCESSION NO.
11. TITLE (Include Security Classification) <i>The War Powers Resolution -- A Troubled Past + Uncertain Future</i>					
12. PERSONAL AUTHOR(S) <i>Douglas A. Grant</i>					
13a. TYPE OF REPORT Research		13b. TIME COVERED FROM <i>Aug 92</i> TO <i>Apr 93</i>		14. DATE OF REPORT (Year, Month, Day) April 1993	
				15. PAGE COUNT <i>36</i>	
16. SUPPLEMENTARY NOTATION					
17. COSATI CODES			18. SUBJECT TERMS (Continue on reverse if necessary and identify by block number)		
FIELD	GROUP	SUB-GROUP			
19. ABSTRACT (Continue on reverse if necessary and identify by block number) SEE ATTACHED					
20. DISTRIBUTION / AVAILABILITY OF ABSTRACT <input checked="" type="checkbox"/> UNCLASSIFIED/UNLIMITED <input checked="" type="checkbox"/> SAME AS RPT. <input type="checkbox"/> DTIC USERS			21. ABSTRACT SECURITY CLASSIFICATION Unclassified		
22a. NAME OF RESPONSIBLE INDIVIDUAL Judy Clark			22b. TELEPHONE (Include Area Code) (202) 475-1889		22c. OFFICE SYMBOL ICAF-FAP

ABSTRACT

TITLE: THE WAR POWERS RESOLUTION; A TROUBLED PAST AND UNCERTAIN FUTURE

AUTHOR: DOUGLAS A. GRANT, LT COL, USAF

Perhaps one of the least talked about, yet most controversial, pieces of legislation surrounding the interpretation of the Constitution is the War Powers Resolution. Supporters say the resolution is essential in order to maintain the intent of the Framers of the Constitution to avoid creating an "Imperial Presidency" (i.e., a characterization from European history where ruling monarchs unilaterally waged war for personal as well as political reasons). Critics say its restrictions of Presidential authority as Commander-in-Chief are flagrantly unconstitutional. Still others see the resolution merely as an ineffective political tool with loopholes that allow each Branch to invoke or ignore it as circumstances necessitate.

The resolution was developed during the height of the Vietnam conflict and specifies conditions under which the President may commit armed forces to hostilities overseas. It also regulates the process under which the President shall consult with the Congress over the use of armed forces as well as the timeframe forces may remain engaged in hostilities without Congressional action. Yet after twenty years of implementation, the resolution still sparks great debate over its constitutionality, requirements, and effectiveness. This debate centers, not along party lines, but between the Executive and the Legislative Branches of the government.

Given the continued debate over its constitutionality and the frequency it has been conveniently ignored by both sides, what is the future of the resolution? In keeping with its title - "The War Powers Resolution; A Troubled Past and Uncertain Future", this paper examines the historical roots of the resolution as well as the resolution itself. Also presented are Executive and Legislative Branch opinions as to the merit and future of the resolution as well as suggestions for improvements and considerations of its relevance for new scenarios in the post Cold War world.

1993
Executive Research Project
S31

The War Powers Resolution-- A Troubled Past and Uncertain Future

Lieutenant Colonel
Douglas A. Grant
U.S. Air Force

Faculty Research Advisor
Dr. Alan G. Whittaker



The Industrial College of the Armed Forces
National Defense University
Fort McNair, Washington, D.C. 20319-6000

DISCLAIMER

This research report represents the views of the author and does not necessarily reflect the official opinion of the Industrial College of the Armed Forces, the National Defense University, or the Department of Defense.

This document is the property of the United States Government and is not to be reproduced in whole or in part for distribution outside the federal executive branch without permission of the Director of Research and Publications, Industrial College of the Armed Forces, Fort Lesley J. McNair, Washington, D.C. 20319-6000.

Accession For	
NTIS GRA&I	<input checked="checked" type="checkbox"/>
DTIC TAB	<input type="checkbox"/>
Unannounced	<input type="checkbox"/>
Justification	
By	
Distribution/	
Availability Codes	
Dist	Special
A-1	

TABLE OF CONTENTS

INTRODUCTION	1
ORIGINS OF THE WAR POWERS RESOLUTION	2
The Constitutional Convention	2
The Gulf of Tonkin	4
Reversal of Power Begins	6
THE WAR POWERS RESOLUTION OF 1973	7
CONTROVERSY	10
The War Powers Resolution as Non-justiciable	11
Constitutionality	13
THE FUTURE OF THE WAR POWERS RESOLUTION	15
Executive Branch opinion	15
Specific Issues	16
Legislative Branch opinion	18
Suggested changes	20
SUMMARY	22
APPENDIX A	
War Powers Resolution Synopsis	25
REFERENCES	27

INTRODUCTION

Perhaps one of the least talked about, yet most controversial, pieces of legislation surrounding the interpretation of the Constitution is the War Powers Resolution. Supporters say the resolution is essential in order to maintain the intent of the Framers of the Constitution to avoid creating an "Imperial Presidency" (i.e., a characterization from European history where ruling monarchs unilaterally waged war for personal as well as political reasons). Critics say its restrictions of Presidential authority as Commander-in-Chief are flagrantly unconstitutional. Still others see the resolution merely as an ineffective political tool with loopholes that allow each Branch to invoke or ignore it as circumstances necessitate. While my observation is that all three positions are well founded, the system of checks and balances upon which our government is founded must apply to the war-making decision process.

The resolution was developed during the height of the Vietnam conflict and specifies conditions under which the President may commit armed forces to hostilities overseas. It also regulates the process under which the President shall consult with the Congress over the use of armed forces as well as the timeframe forces may remain engaged in hostilities without Congressional action. Yet after twenty years of implementation, the resolution still sparks great debate over its constitutionality, requirements, and effectiveness. This debate centers, not along party lines, but between the Executive and the Legislative Branches of the government.

- Given the continued debate over its constitutionality and the frequency it has been conveniently ignored by both sides, what is the future of the resolution? In keeping with its title - "The War Powers Resolution; A Troubled Past and Uncertain Future", this paper examines the historical roots of the resolution as well as the resolution itself. Also presented are Executive and Legislative Branch opinions as to the merit and future of the resolution as well as suggestions for improvements and considerations of its relevance for new scenarios in the post Cold War world.

ORIGINS OF THE WAR POWERS RESOLUTION

The Constitutional Convention

Debate over the need to balance the powers of government with respect to waging war began during the framing of the Constitution. While there appears to be little evidence of a debate over the need to separate war powers between the Legislative and Executive Branches, the degree of separation did cause significant turmoil. The discussion ran the gambit of possibilities; from allowing the President to initiate war, to restraining Presidential power to only repel attack. After great debate, basic agreement focused on Alexander Hamilton's position (later penned as Federalist Paper number 69) which "reflects the Framers' determination not to repeat Europe's history of executive-initiated wars." (1, pg 60) In doing so, the Convention embraced delegate Roger Sherman's view that the Executive should be able to repel, not commence war (2, pg 60) and that the Legislature "be given the power to make war." (3, pg 13)

Given what then seemed to be sweeping Congressional power, debate immediately ensued over Congress's ability to fulfill this role. The size of the Legislature, its infrequency of being in session, and attendant inability to reach consensus in a timely manner were matters of concern; concerns that continue to this day. Two delegates, Elbridge Gerry and James Madison argued if Congress was not in session there would be no Constitutional method to defend the nation. Their recommendations to change Legislative authority from "make war" to "declare war" and Executive authority to "repel attacks" (conduct war) were adopted as a means of equalizing responsibility. (4)

The issue lay dormant for many years until it became "the subject of Constitutional tension" (when) "President Jefferson deployed a squadron of war ships to the Mediterranean in 1801...without the consent of Congress." (5, pg 16) To bolster his position, Jefferson cited the Militia Act of 1795 which gave him the ability to mobilize "whenever the United States shall be invaded or in imminent danger of invasion from any foreign nation. (6, pg 18) This became the basis for future Presidential actions in the interest of national security.

Numerous examples of unilateral Presidential action exist throughout US history, but perhaps the most representative occurred when the legal basis for President Truman's intervention in Korea was challenged. Responding to Congressional criticism over the decision to deploy troops, Secretary of State Dean Acheson prepared a listing of 87 unchallenged occasions when the Presidency had acted similarly without the consent or disagreement of Congress. Many saw this as a precedent to future Presidential immunity. (7)

The Gulf of Tonkin

After 1950 when President Truman placed troops in Korea and Congress fell silent, the cumulative effects of an inattentive Congress mounted. Despite his brief tenure as President, the actions of John Kennedy in the Bay of Pigs incident, deployment of troops to Laos, and the 1962 Cuban naval quarantine served to heighten Congressional sensitivity. (8) So while many historians point to the Gulf of Tonkin Resolution as the precipitating reason for revamping the war powers, it is perhaps more properly portrayed as the final motivation for Congress to begin the task of delineating the separation of war powers. The impetus for the Gulf of Tonkin Resolution was an attack on US naval forces.

Official reports indicate, on 2 August, 1964, while on routine patrol in the Gulf of Tonkin, the destroyer Maddox was attacked by naval forces from North Vietnam. While some say the incident was provoked or contrived, the Gulf of Tonkin resolution, passed by Congress three days later, gave sweeping powers to President Johnson to conduct military operations.

Dr John H. Sullivan, a former member of the Senate Foreign Affairs Committee, conducted a study to determine why Congress passed the Gulf of Tonkin Resolution so quickly and so overwhelmingly. The study, entitled The War Powers Resolution, A Special Study of the Committee on Foreign Affairs, gave three compelling reasons. First was the persistent inability of Congress to define executive and legislative scopes of responsibility in crisis situations. Congress was in the habit of passing resolutions (as it did for Kennedy and Eisenhower). The difference was that in the past these resolutions were never used to

expand US involvement in overseas hostilities as President Johnson would later do. Second was the sense of urgency placed upon the situation by the White House. No one questioned the information given by the President on the Gulf of Tonkin incident; perhaps for fear of being seen as unpatriotic. This leads to the final reason for the resolution's passage: US forces had been attacked without warning - reminiscent of Pearl Harbor.

The difference between the Gulf of Tonkin Resolution and similar legislation for past Presidents involved Johnson's broad interpretation of its mandate to include the rapid involvement of US forces. Working with a perceived blank check, President Johnson rapidly escalated US presence in Vietnam, and Congress remained silent. Professor Richard Bartlett of Tufts University summed up the situation and subtly challenged Congress when he said "the positions of the Executive and Legislative Branches of the federal government in the area of foreign affairs have come very close to reversal since 1789...The President virtually determines foreign policy and decides on war and peace, and the Congress has acquiesced in, or ignored, or approved and encouraged this development." (9, pg 10)

As time passed, public sentiment for the war turned and in 1967 the Congress was being pressed to answer the difficult question: "has the power to decide between peace and war slipped out of control of the American people and out of the hands of their representatives in Congress, where the Constitution placed it?" (10, pg 4) Embarrassed over years of neglect, the members of Congress recognized this to indeed be the case and began to take steps to reestablish their authority.

Reversal of Power Begins

To begin the process of reestablishing Congressional authority over war powers, the National Commitments Resolution was introduced by the Senate Foreign Relations Committee in July, 1967. It stated that Congress would henceforth reassert its Constitutional responsibilities in foreign affairs, considering itself a full partner with the Executive Branch. (11, pg 23)

Though never enacted, this resolution became the precursor of the War Powers Resolution of 1973.

The issue of shared decision making in war powers remained obscured in legislative debate for nearly three years until, in late 1969, two significant and nearly concurrent incidents brought the issue to focus once again. First the Senate Subcommittee on US Security Agreements and Commitments Abroad began to hold hearings to discuss allegations concerning President Johnson's handling of the Vietnam war. It was determined that secret payments to Filipino, Thai, and Korean troops in Vietnam were made to encourage the appearance of free world support of US involvement. Also discovered were the secret CIA military actions in Laos. Second, in May, 1970, despite a war-weary nation, President Nixon invaded neutral Cambodia without any Congressional consultation. A mass of war powers legislation emerged from both Houses of Congress; the most succinct was introduced by Senator Jacob Javits.

Javits envisioned the Congress developing a game plan or framework for joint Presidential and Congressional action. When signed, it would represent a pact for working out the gray

areas of the Constitution made obvious through decades of partisan interpretations. After great debate and much wordsmithing by the Senate Foreign Relations and House Foreign Affairs Committees, the joint War Powers Resolution was forwarded to President Nixon for signature. (12, pg 3-5)

Without hesitation, citing the resolution as *unconstitutional and dangerous to national* interests, President Nixon vetoed the measure. He stated the resolution would "strike from the President's hand a wide range of important peacekeeping tools by eliminating his ability to exercise quiet diplomacy backed by subtle shifts in our military deployments." (13, pg 8) Nixon went on to specify the unconstitutionality of several sections of the resolution, the specifics of which are presented later in this paper. With equal swiftness, Congress overrode the veto and on November 7, 1973 passed the War Powers Resolution.

THE WAR POWERS RESOLUTION OF 1973

The War Powers Resolution is contained in Public Law 93-148, 7 Nov 1973. Its stated purpose is to:

"fulfill the intent of the Framers of the Constitution of the United States and insure that the collective judgement of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances..." (14, pg 1)

In fulfilling the perceived intent of the Framers via the War Powers Resolution (a synopsis of

the resolution is provided at Appendix A), Congress has stipulated the conditions under which the Commander-in-Chief can introduce forces as well as the timeframe in which he is allowed to act before Congress removes those powers by terminating the military action.

Congress based the resolution on clarifying the vagueness of the Constitution regarding war powers. For example, Article I, Section 8 of the Constitution clearly outlines Congressional authority to make all laws necessary to execute its powers - including declaring war. Article II of the Constitution empowers the President as Commander-in-Chief of the armed forces, but goes no further in defining authorities short of wartime; leaving room for future interpretations.

Section 2(c) of the resolution restricts the President, as Commander-in-Chief, from introducing armed forces into hostilities, or situations where hostilities appear imminent except in three situations:

"...1) declaration of war, 2) specific statutory authorization, 3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." (15, pg 1)

Section 3 of the resolution requires the President to make every possible effort to consult with Congress prior to introducing forces into hostilities or imminent hostile situations and further requires regular consultations once forces have been committed. The terms "consult" and "Congress" are not further clarified.

The President must submit a report within 48 hours when, short of war, US Armed Forces are placed in hostile situations, or

"...into the territory, airspace, or waters of a foreign nation, while equipped for combat, except for deployments...or in numbers which substantially enlarge United States Armed Forces equipped for combat..." (16, pg 2)

The report is forwarded to the President pro tempore of the Senate. The report shall establish:

"...the circumstances necessitating the introduction of the United States Armed Forces, the Constitutional and legislative authority under which such introduction took place, and the estimated scope and duration of the hostilities or involvement" (17, pg 2)

Section 8(c) defines the "introduction" of armed forces to include "the assignment of members...to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government..." (18, pg 3)

Section 5(b) establishes a sixty day period beyond which the President must terminate actions unless: (1) war has been declared, (2) an extension is granted by Congress, or (3) the President is unable to meet with Congress as a result of an attack upon the United States. The sixty day "clock" begins the day the initial report, citing the resolution, is submitted to Congress. Congress, short of a declared war, may only extend the President's authority by thirty days. At the end of these ninety days, Congress must declare war or require the President to cease all actions. Regardless of the above, Congress may direct the removal of all armed forces at any time through concurrent resolution. Concurrent resolution requires

only a simple majority of each House and is not forwarded to the President for review and possible veto.

As will be discussed later in this paper, there are restrictions within the resolution which clearly curtail the powers of the President to act as Commander-in-Chief of the armed forces. Stipulating conditions under which the President may act (Section 2(c)), requiring consultation prior to action (Section 3), setting time limits to his authority (Section 5(b)), and allowing the Legislative Branch to totally strip Presidential authority through concurrent resolution have placed serious doubt upon the constitutionality of the resolution. The next section reviews these and other legal and Constitutional controversies which have long surrounded the resolution.

CONTROVERSY

The War Powers Resolution addresses the critical issue of dealing with undeclared or Presidential wars. It is seen by many in Congress as symbolic of the effort to reclaim prerogatives lost over previous decades of Presidential expansion and Congressional acquiescence. It also represents the machinery necessary for co-determination of foreign policy and must therefore be reviewed periodically for its contemporary application.

According to its author, Jacob Javits, the success of the resolution (regardless of its symbolic nature or ease of implementation) should be measured by how it achieves its purpose: to

restrain Presidential war-making powers. (19) It is those restraining mechanisms which have fueled the controversies over the resolution. This section reviews those controversies as a means of putting into perspective contemporary opinions presented later in the paper. The relevant controversies have not changed significantly over the years and can be divided into two general categories; legal and constitutional issues.

The War Powers Resolution as Non-justiciable

Justiciability refers to a matter's capability of being decided by legal principles or its liability for trial in a court of justice. History has shown that enforcement of the War Powers Resolution is not a matter which is likely to be decided in a court of law and therefore it may not necessarily be enforceable.

The first legal test of non-compliance with the resolution occurred in 1982 when President Reagan placed military advisors in El Salvador. Congressman George Crockett filed suit on the grounds that, failing a declaration of war, the President must submit a report (as required in Section 4 of the resolution) detailing the authority used. Since President Reagan did not submit the report, he was in violation of the law. The Federal District Court held the action as non-justiciable because of the type of fact-finding required to resolve the situation.

Specifically, "It observed that such questions as the extent and nature of US presence in El Salvador are more appropriate for Congressional, not judicial investigation and determination." The Court went on to say "the legislative scheme did not contemplate court-ordered withdrawal when no report has been filed, but rather, it leaves open the possibility

for a Court to order that a report be filed," thus starting the sixty day clock. Similar suits were filed, each resulting in a common Court opinion that when plaintiff legislators have institutional remedies (affordable to the Congress) to resolve political disagreements, the Courts should decline intervention. (20, pg 216)

As time passed the matter of justiciability, though the bedrock of the decision for judicial non-intervention, moved to the background as the courts gave more specific reasoning. In 1987, 110 members of the House of Representatives filed suit when troops were sent to the Persian Gulf for escort duties. The motion again requested immediate cessation, pending a full disclosure report as required in the resolution. In its response, the Court said that if it were to act, thus forcing the President to furnish a report, it would be deciding whether troops were in an environment where hostilities were imminent. Stating it was out of the Court's jurisdiction to do so, the suit was rejected.

The most recent instances surrounded Desert Shield/Storm. On November 20, 1990, Representative Dellums and 44 other democrats filed suit to stop the build-up unless President Bush received Congressional approval. The Court struck down the motion; this time because the majority of Congress was not seeking relief and the President's actions had not clearly indicated an intention to go to war. The last suit filed was by a member of the armed forces. An Army sergeant sought an injunction claiming his orders to report to the Gulf were not enforceable because the President exceeded his authority under the Constitution and the resolution. The Court again dismissed the case; this time because, in

the Court's opinion, the Constitution leaves "resolution of the war powers dispute to the political Branches, not the Judicial Branch." (21, pg 7-8)

The Courts, including the US Supreme Court, have never ruled in favor of a motion seeking relief under the War Powers Resolution. While the reasoning has varied, a common thread of non-justiciability is apparent.

Constitutionality

It is interesting that while many Presidents lauded the separation of war powers prior to the resolution being implemented, nearly every Commander-in Chief since has considered it patently unconstitutional. Author Robert Turner, a staunch opponent of the resolution, sums up Presidential opinion well when he says "the most confident judgement one can make about the 1973 War Powers Resolution is that several of its most fundamental provisions are flagrantly unconstitutional." (22, pg 107)

The first of these provisions limits the powers of the President as Commander-in-Chief and is found in Section 2(c) of the resolution. See Appendix A for the specifics of this section. Here, the broad Presidential powers set forth in the Constitution to act as Commander-in-Chief are limited to only three instances; upon declaration of war, statutorily authorized actions, or direct attack. The standing opposing argument states that the resolution restricts Constitutional authority for the President to act as the Commander-in-Chief.

The next two areas of constitutional controversy are found in Section 5 of the resolution. Subsection (b) limits to 60 days (with a one time 30 day extension) the time period in which the President is allowed to exercise his authority as Commander-in-Chief. After the 60 or 90 day period, the President must cease all actions unless expressly authorized by the Congress via a declaration of war. Should Congress fall silent, and avoid making an overt decision, Presidential prerogatives are removed just the same. Subsection (c) allows Congress, via a concurrent resolution, to order the cessation of action at anytime deemed appropriate.

This last controversy deals with the Presentation Clause of the Constitution. The Presentation Clause requires certain legislative acts be presented, via joint resolution, to the President for review. This enables the Executive Branch to use its veto authority. Legislation which falls within the bounds of the Presentation Clause but is not forwarded for Presidential review, is considered unconstitutional. In the 1983 case, *Chadha versus the Immigration and Naturalization Service*, the Supreme Court strengthened its interpretation of the clause by indicating that Congressional legislature, aimed at altering the rights or duties of people outside the Legislative Branch, must go through the constitutionally mandated review process. Resolution critics say Section 5(c), because it restricts the duties of the President, falls within the bounds of the Presentation Clause. Yet Section 5(c), by allowing Congressional action via concurrent resolution only, circumvents Presidential veto authority and violates the intent of the Presentation Clause. (23)

This portion of the paper has focused on the long-standing legal and constitutional

controversies surrounding the War Powers Resolution. For a variety of reasons, centering around the justiciability of the resolution, the Courts have been reluctant to intervene in what they consider political questions. A change to the resolution appears necessary to reverse this trend. Several sections of the resolution also raise questions as to its constitutionality. These controversies will not be resolved unless the war powers relationship between the Executive and Legislative Branches changes or the resolution itself changes. The next section focuses on the future of the resolution and suggests changes necessary to its survival and effectiveness.

THE FUTURE OF THE WAR POWERS RESOLUTION

To this point, this paper has presented the historical roots of the resolution, why it was developed, and the long-standing controversies surrounding it. But what is the future of the resolution? What is the contemporary Legislative and Executive Branch thought surrounding the resolution? What changes might be made to ameliorate the disagreements which hamper its effectiveness?

Executive Branch Opinion

Contemporary Executive Branch positions on the War Powers Resolution do not stray far from those long-standing opinions found in the literature. These opinions were best expressed in a personal interview with Mr Charles Rostow, Special Assistant to the President and Legal Advisor to the National Security Council, and Mr George Andreacos, Director of

Legislative Affairs for the National Security Council. In general, the resolution is seen as a toothless, unconstitutional piece of legislation filled with loopholes which negate any desired restrictions on the Commander-in-Chief. (24)

Citing some of the same court cases presented in this paper, Mr Rostow does not believe the legislation will ever be successful in bringing the Judicial Branch into the fray. In fact, he sees the cumulative affects of these cases strengthening the perspective that the resolution remains a political struggle, precluding judicial intervention. (25)

Lacking judicial intervention and/or a redrafting effort, the resolution will continue to be seen as unconstitutional by the Executive Branch. Contemporary Executive Branch opinion continues to recognize the sections limiting Presidential action, requiring prior consultation with Congress, and troop recall after a specified period or concurrent resolution as most disagreeable. The latter attracting the most vehement Executive Branch response. (26)

Specific Issues

Mr Rostow and Mr Andreacos see the consultation requirement as vague and lacking any constitutional meaning. Would a phone call to the Speaker of the House suffice or does it require full membership participation? If full member participation is required, the infrequency of full Congressional sessions and the attendant difficulties posed in making urgent decisions are seen as major problem areas. Congress itself has recognized the gray area surrounding the requirement for consultation and has tried unsuccessfully to clarify it in

the past. (27) Accordingly, the Executive Branch has and will continue to consider after-the-fact notification as sufficient under the resolution.

Mr Rostow sees the 60 day troop recall and forced cessation via concurrent resolution as flagrantly unconstitutional. While loopholes have been found to neutralize the 60 day clock requirement, Executive Branch opinion to repeal this section remains firm. The loopholes are found in Section 4 of the resolution which specifies the conditions under which Presidential reporting is required. Section 4a(1) refers to deployments into hostile environments. Sections 4a(2) and (3) refer to deployments to foreign countries or deployments in sufficient numbers to greatly increase presence. If the Presidential report cites Section 4a(1) (therefore conceding a hostile environment), the 60 day clock begins. However, reporting "consistent with the resolution" by citing Sections 4a(2) or (3) merely informs Congress that combat troops are being deployed outside the United States and the clock does not trigger. This is exactly what President Bush did during Desert Shield. (28)

Although considered unconstitutional in formal terms, in practice the Congress can enforce the troop withdrawals otherwise sought via concurrent resolution, through its control of funding. Even if Congress invokes its perceived control over troop deployments and the President ignores the action, Congress may simply cut off funding, necessitating eventual troop withdrawal. This is seen as a plausible threat for Congress to enforce its intent. (29)

Nevertheless, there are several reasons why Congress would be reluctant to cut funding

support. First, it is extremely dangerous for the troops. In the age of advanced telecommunication, the enemy will know the decision as fast as the US commanders responsible for the forces. Second, it is a slow process in its execution and the use of covert funding from special operations budgets could extend Executive support for some time. Finally, public opinion is an obstacle to such action. Congress would be fool-hardy to be seen as wantonly placing troops in danger by cutting the money supply. (30)

Current Executive opinion maintains that the War Powers Resolution has not affected Presidential use of force and is not likely to in the future. When asked if the resolution had kept the US out of any military actions, Mr Rostow summed it up by saying "we pay the President \$200,000 each year to make the right decisions. He makes them based on all factors. The War Powers Resolution is an after-thought of the staff, not a consideration of the President." (31)

Legislative Branch Opinion

The catch-phrase for Legislative Branch opinion on the resolution is "aggressive reform" and is best illustrated by current initiatives. Despite twenty years of argument, no formal legislative changes to the resolution have ever been made. While dozens of Presidential reports have been submitted "consistent with" the War Powers Resolution, only one, the deployment to Lebanon, cited Section 4a(1) thus bringing the full weight of the resolution into play. This track record reflects the ineffectiveness of the resolution in its current state and necessitates reform if its intent is to be realized.

Legislation to reform the War Powers Resolution is not a new idea. As recent as 1989, bipartisan legislation was introduced to bring the resolution into line with contemporary needs. What is new is the resurgent strength for reform. Senator John Warner, a Republican, proposed the original bill. During his floor remarks he admitted the resolution was ineffective as written and possibly unconstitutional. It was not assisting Congress in making foreign policy contributions and therefore required updating. His amendment would have repealed the 60 day clock and replaced it both with a process of continuous consultation, and the requirement for a joint resolution to force troop withdrawal. The Senate Committee on Foreign Relations never held hearings on the Warner amendment and it died in committee at the conclusion of the 101st Congress. (32)

Shortly after the amendment died, the build-up for Desert Shield/Storm began. Once again loopholes in the resolution were used and Presidential consultation with Congress did not occur. A resurgent effort to make the resolution viable began and the amendment was brought back to life with broader support.

The legislation currently being proposed recognizes the questions of constitutionality as well as the long-standing issues of disagreement between the two Branches. Authors and main supporters of the current legislation include Senators Byrd, Nunn, and Warner. They represent both parties and serve as Chairman of the Senate Appropriations Committee, Chairman of the Senate Armed Services Committee, and ranking minority member to the Senate Armed Services Committee, respectively.

The current measure, called the Nunn amendment, is an effort to clarify the intent of the resolution, smooth the areas of Presidential friction, and resolve the questions of constitutionality. This would bridge the gap between the two Branches, creating a cooperative atmosphere as was Senator Javits' intent in 1973. The measure proposes repealing the 60 day clock and replacing it with the establishment of a standing consultive group. The group, represented by the Legislative and Executive Branches, would meet in time of crisis to jointly establish plans of action and would be sized for ease of decision-making. Gone would be two of the main arguments against the resolution; the 60 day clock and violation of the Constitution's Presentation Clause.

Suggested Changes

For the War Powers Resolution to be effective, it must be changed. Currently, Congress is helpless to enforce the resolution except through the budget process. While many believe the Nunn amendment satisfies the major disconnects between the two Branches, there are additional changes which could be made to create a more cooperative atmosphere.

The threat of global war is greatly diminished and we have recently restructured our armed forces to address the current threat - regional conflicts of short duration. Coupled with the fact the New World Order seems to facilitate a global participation in political and military stability, this implies an expanded role of the UN as the facilitator of world peace. Recent events in Sarajevo, Somalia, and post-war Iraq are prime examples. The US must therefore be prepared to react not only to situations requiring unilateral American intervention, but also

UN sponsored actions. The US must recognize the responsibilities placed on UN members through the UN Charter and be prepared to respond accordingly.

Under the UN Charter the President is expected (by other member nations) to furnish up to 1,000 troops in support of UN actions. Current events suggest this type of request is likely to increase but neither the War Powers Resolution nor the Nunn amendment address this probability. Clearly, a reformed resolution must address this probability and be structured to allow the President to support UN peacekeeping efforts in a timely manner.

The resolution should specify situations where the President can act unilaterally. This has been an argument since the resolution was first drafted in 1973. This approach would involve specifying instances where the President can use armed forces without the resolution being implemented. Specifying a numeric ceiling for unilateral troop deployments to hostile areas is one possibility. This would clarify conflicts between UN actions and US-only actions discussed above.

Consultation must be clearly defined. Robert Turner aptly stated the problem of full session consultation when he said "Congress lacks the expertise to deal hurriedly with complex foreign policy emergencies....Most members are too busy with other duties...." During a period of crisis, decisiveness is crucial. What you don't need is 536 individuals trying to make decisions, each of whom thinks "he is the Secretary of State." (33, pg 109) Perhaps consultation should mean discussions with the crisis management team established in the

Nunn amendment. Regardless, consultation must be defined as a genuine exchange of information and a seeking of advice and council, rather than a letter stating what has already occurred. Additionally, to keep pace with rapidly evolving crisis situations, consultations must be both timely and decisive.

Finally, a revised resolution should specify that any member of Congress may bring action in US courts to enforce the reporting requirement. One argument used by the courts in avoiding involvement is there was no standing authority to so. This would open the way to a justiciable resolution. (34) While Executive Branch approval might not be forthcoming on this proposal, it is necessary to put strength into the legislation. The bottom line is Congress can, via a two-thirds vote, override Presidential veto should the proposal experience that level of opposition.

SUMMARY

Based upon a desire to break from the past and rid themselves of an "Imperial Presidency", the Framers of the Constitution made concerted efforts to separate the powers to declare and conduct war. Clearly, the Framers of the Constitution recognized the imbalance created by allowing the Executive (Monarch) to make unchecked decisions on war. Considerable attention was given to the subject during the Constitutional Convention as evidenced in numerous Federalist Papers. That desire is propagated via the War Powers Resolution which clearly states the need for collective (Executive and Legislative Branch) judgements when

considering aggression. However, what may have seemed clear at the Constitutional Convention in 1789 has been the source of controversy ever since. Through the years, especially in the modern era, the Presidency has assumed greater control over the war powers, while Congress has acquiesced. The cumulative effects, however, of Congressional acquiescence and embarrassment rose to a head during the Vietnam conflict. The result was a keen desire to modernize the Framers' idea for separate war powers, and the product was the War Powers Resolution.

I believe an effective War Powers Resolution is necessary to ensure the decision between peace and war resides in the hands of the American people, and not solely with the President. However, as currently written, the resolution does not ensure this and the battlelines have grown more distinct as arguments over the constitutionality of the resolution continue.

Clearly, there are great differences of opinion over the constitutionality of the resolution. Those opinions are not necessarily partisan based, but rather founded in fundamental differences between how the Congress and the Presidency view their authority to wage war. Equally clear is the fact that time and changing administrations will not cure the problem. Only through reform will the War Powers Resolution ever take on the authority and effectiveness necessary to ensure the desired separation of power.

Despite Executive Branch opinion, the idea of separation of war powers is consistent with the

Constitution and does serve as a meaningful check and balance. Clearly, the Framers of the Constitution recognized the danger created by allowing the Executive (or monarch) to make unchecked decisions on war. Considerable attention was given to the subject during the Constitutional Convention as evidenced in numerous Federalist Papers. That desire is propagated via the War Powers Resolution which states the need for collective judgements when considering aggression. However the resolution is ineffective in its present state. Continued non-compliance by the Presidency and the inability of Congress to enforce the resolution necessitates efforts to either repeal or amend the resolution. Bipartisan Congressional support for some role in war power issues remains strong enough to negate efforts to repeal the measure. Aggressive reform currently underway in the Legislature addresses the basic areas of non-compliance and constitutionality. However, additional amendments are possible. Whatever form the amendment takes, the revised resolution must address cooperative peacekeeping involvements through the auspice of the UN. Clearly, the frequency of UN sponsored initiatives is on the rise and the present resolution is silent with respect to Presidential authority under the UN Charter. The future of the War Powers Resolution lies not only in the ability of Congress to remove existing barriers which keep the Executive and Legislative Branches at odds, but also to provide language that both a two-thirds majority will support and a recalcitrant Executive Branch will not energetically seek to circumvent.

APPENDIX A

WAR POWERS RESOLUTION SYNOPSIS

<u>Topical Area</u>	<u>Section</u>	<u>Content</u>
Purpose and Policy	2(a)	To fulfill the intent of the Framers of the Constitution and ensure the collective judgments of Congress and the President are combined when considering introduction of US forces in hostile areas.
	2(b)	Reiterates Congressional power to make all laws necessary to conduct governmental business.
	2(c)	Bounds the Constitutional powers of the President as Commander-in-Chief to deploy forces into hostile areas to three circumstances: 1) after a declaration of war, 2) after statutory authorization, 3) in a national emergency such as direct attack on the US.
Consultation	3	Requires the President, in every possible instance, to consult with Congress prior to introducing forces into hostilities. Requires regular consultations with Congress thereafter until forces are no longer engaged in hostilities.
Reporting	4	Establishes conditions under which a written report from the President is required, as well as the content of the report.
	4(a)	In the absence of a declaration of war and when forces are introduced into hostilities (or situations where hostilities are imminent), into a foreign nation while equipped for combat (excluding normal deployment, eg. training), or in sufficient number to substantially enlarge combat presence, a report is required within 48 hours of the introduction of forces. The report must outline the circumstances necessitating intervention, the Constitutional and legislative authority used as justification, and the scope and duration of involvement.
	4(b)	Requires the President to supply other information required by Congress in its deliberation over declaring war.
	4(c)	Requires the President, when forces are deployed as discussed in 4(a), to periodically report status to Congress.

**Congressional
Action**

- 5(a)** Establishes review procedures for reports submitted to Congress under 4(a). Should Congress be in recess, and the Speaker of the House and President pro tempore of the Senate deem necessary, the President shall convene a special session of Congress to consider the report.
- 5(b)** Establishes a time period under which the President may conduct operation in hostile areas. Within 60 days of submitting a report under 4(a), the President must terminate actions unless: 1) Congress has declared war, 2) Congress extends the 60 day period, or 3) Congress is physically unable to meet as a result of direct attack.
- 5(c)** Regardless of 5(b), Congress may, via concurrent resolution, direct the cessation of involvement at any time.

**Congressional
Priority Procedures
for Joint Resolutions**

- 6** Establishes procedures under which Congress may extend the 60 day time period in 5(b) to 90 days. Consideration must be expedited.

**Congressional
Priority Procedures
for Concurrent
Resolutions**

- 7** Establishes procedures under which Congress will process concurrent resolutions introduced pursuant to 5(c) - cessation of involvement.

**Interpretation of
the Joint Resolution**

- 8** Defines "introduction" of US forces to include forces which might "command, coordinate, participate" in the actions of regular or irregular foreign forces.

**Separability
Clause**

- 9** Establishes the fact that, should any portion of the War Powers Resolution be found invalid, the application of the remaining portions is unaffected.

REFERENCES

1. George F. Will, Newsweek, "Once Again Ike Was Right", Jan 14, 1991, pg 60.
2. Ibid, pg 60
3. Jacob Javits, Who Makes War: The President Versus Congress, William Morrow and Company, New York, NY, 1973.
4. Ibid, pg
5. National Review, "Declare Yourselves", Vol XLIII, No. 1.
6. Ibid, pg 18
7. George M. Huckabee, Major, USA, "The War Powers Resolution: Law or Political Rhetoric?", Air Force Law Review, pg 207-25.
8. Ibid
9. Anthony Austin, The President's War, Coverleaf, J.B. Lippencott Co., Philadelphia, PA, 1971
10. Ibid, pg 4
11. Ibid, pg 23
12. Pam M. Holt, The War Powers Resolution: The Role of Congress in U.S. Armed Intervention, American Enterprise Institute for Public Policy Research, Washington, D.C., 1978
13. Ibid, pg 8
14. Public Law 93-148, "The War Powers Resolution", House Joint Resolution 542, Washington D.C., 7 Nov, 1973
15. Ibid
16. Ibid
17. Ibid
18. Ibid

19. Jacob Javits, Foreign Affairs, "War Powers Reconsidered", Fall, 1983, pg 130-35
20. Ibid, Huckabee, pg 216
21. Ellen C. Collier, CRS Issue Brief, "War Powers Resolution: Presidential Compliance", Library of Congress, dated 9 Nov, 1992
22. Robert Turner, "The War Powers Resolution: Its Implementation in Theory and Practice", Foreign Policy Research Institute, Philadelphia, PA, 1983
23. Ibid, Huckabee
24. Personal Interview, Mr Charles Rostow, Special Assistant to the President and Legal Advisor to the National Security Council, and Mr George Andreacos, Director Legislative Offices, National Security Council, 6 January, 1993
25. Ibid
26. Ibid
27. Ibid
28. Ibid
29. Ibid
30. Ibid
31. Ibid
32. Ibid, Collier
33. John Lehman, Making War: The 200 Year Old Battle Between the President and Congress Over How America Goes to War, Charles Scribners and Sons, New York, NY, 1992
34. John Ely Columbia Law Review "Suppose Congress Wanted a War Powers Act That Worked", Vol 88, No 7, pg 1379-1431
35. GPO, Review of the War Powers Resolution, Hearings before the Investigations Subcommittee of the Committee on Armed Services, House of Representatives, 101st Congress, 1st and 2nd Sessions, 24 May and 26 Sept, and Jan, 1990, Washington, D.C., 1991

36. GPO, The Constitutional Roles of Congress and the President in Declaring and Waging War, Hearings before the Committee on the Judiciary, S Senate, 102nd Congress, 1st Session, Serial No J-102-1, Washington, D.C.
37. Michael Glennon, Constitutional Diplomacy, Princeton University Press, Princeton NJ, 1990, pg 113-20
38. Congressional Quarterly, Almanac, 93rd Congress, 1st Session, 1973, Vol XXIX, Washington, D.C., pg 905-20
39. Michael Rubner, Political Science Quarterly, "President Reagans Administration, the 1973 War Powers Resolution, and the Invasion of Grenada", Academy of Political Science, Winter, 1985-86, Capitol Press, Montpelier VT
40. Jacob Javits Foreign Affairs, "War Powers Reconsidered", Fall 1985, Vol 64, No 1, New York, NY
41. Alfred Rubin, Foreign Science, "War Powers Act, Generous Curb, or Wise Restraint?", Feb, 1991
42. James Nathan, Polity, "Curbing the Distress of War: An Outline for a War Powers Resolution the Works", Vol XXIII, No 4, Summer, 1991, pg 605-628
43. The Wall Street Journal, "How Bush Outflanked Iraq and Liberated the Constitution", 6, Mar, 1991, A-9
44. R. Basler, The Collected Works of Abraham Lincoln, Remarks in the US House of Representatives Vol I, 1953, pg 504
45. The Washington Post, "Cheney Essay Assails Congressional Over-reacting", 14 Mar, 1989, A-4